NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. C.G.F.*, 2003 NSCA 136

Date: 20031210
Docket: CAC 194257
Registry: Halifax

Between:

F. (C.G.)

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on publication: Publication Ban pursuant to ss. 110(1) and 111(1) of the **Youth Criminal Justice Act**

Judges: Roscoe, Cromwell and Saunders, JJ.A.

Appeal Heard: October 6, 2003, in Halifax, Nova Scotia

Held: Appeal allowed in part per reasons for judgment of Cromwell, J.A.; Roscoe and Saunders, JJ.A. concurring.

Counsel: Chandrashakhar Gosine, for the appellant
James Gumpert, Q.C. and Kenda Murphy, for the respondent

Publishers of this case please take note that s. 110(1) and s. 111(1) of the **Youth Criminal Justice Act** apply and may require editing of this judgment or its heading before publication.

Section 110(1) provides:

Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

Section 111(1) provides:

Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or a young person, if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person.

Reasons for judgment:

I. Introduction:

[1] One sexual incident between the appellant and the 13 year old complainant led to the appellant's conviction on four charges: sexual touching, sexual assault and two counts of failing to be of good behaviour in breach of two undertakings. The appellant appeals the convictions. He argues that all the charges ought to have been judicially stayed because he was arbitrarily detained after his arrest and that the trial judge made errors in law concerning the elements of the offences and in finding this record supported the convictions. He also submits that the *Kienapple* principle – that one ought not be punished twice for the same wrong – precludes convictions for sexual touching and sexual assault arising out of the same sexual incident. In addition to these points, the Court raised with counsel the question of whether the breach of undertaking convictions could stand on this record or in light of the *Kienapple* principle.

[2] I would allow the appeal in part. The convictions for both sexual touching and sexual assault offend the *Kienapple* principle. The Crown concedes, in my view correctly, that the *Kienapple* principle applies to prevent conviction on the sexual touching charge where the appellant was convicted of sexual assault arising from the same incident. I would, therefore, set aside the sexual touching conviction and in its place enter a conditional stay. I would also set aside the convictions for breach of undertaking because the judge erred in law by failing to make a reasoned finding on an essential point, namely that the breaches occurred while the undertakings were in force. I would not disturb the conviction for sexual assault or the judge's decision not to enter a judicial stay of proceedings. The judge was right to find that there had been no arbitrary detention and did not make any of the errors of law alleged by the appellant with respect to that conviction.

II. Overview of the facts and the decision of the trial judge:

[3] It will be helpful to review the facts and the trial judge's decision under four headings. I will turn first to the appellant's application at trial for a judicial stay of proceedings on the basis of an alleged breach of his *Charter* right not to be

arbitrarily detained. Then I will address the facts and decision relating to whether consent of the young complainant was relevant to the outcome of the trial. Third, I will review whether the appellant reasonably had a mistaken belief as to the age of the complainant and then conclude with a review relating to the breach of undertaking charges.

1. Arbitrary detention and stay of proceedings:

[4] The first issue confronted by the trial judge was the appellant's application for a judicial stay of proceedings. The appellant submitted that he had been illegally remanded for more than the three clear days permitted under s. 516(1) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46 and that the remand had been ordered without an adequate hearing. These failings, said the appellant, made the remand not only unlawful, but in violation of his *Charter* right not to be arbitrarily detained. This violation, he said, entitled him to the remedy of a stay of proceedings.

[5] The trial judge rejected these arguments. He found that the remand did not exceed the three clear days permitted under s. 516(1), that there was no failure to comply with the **Criminal Code** provisions in granting the three day remand and that, therefore, there had been no *Charter* breach. In the alternative, the judge concluded that even if there had been arbitrary detention, a stay would not have been the appropriate remedy.

2. Relevance of the complainant's consent:

[6] With respect to the sexual touching and sexual assault charges, the trial judge found that in November or December of 2001, when the appellant was 15 and the victim 13, the accused and the victim "got together in the home of the accused ... [and][O]ral sex occurred by the appellant placing his penis in the mouth of the complainant." This finding is not challenged on appeal. While there was a difference in the evidence at trial as to which participant instigated the sexual activity, it is common ground that it occurred voluntarily from the perspective of both the appellant and the complainant.

[7] A critical issue at trial, therefore, was whether the consent or non-consent of the complainant was relevant to the appellant's guilt or innocence. Under the

Criminal Code, this issue turns mainly upon the respective ages of the complainant and the appellant at the time of the sexual incident. The **Code** provisions in this regard are somewhat intricate and it will be helpful to review them here.

[8] First, the provisions with respect to the offences themselves. Section 151 of the **Criminal Code** makes it an offence to touch a person under the age of 14 for a sexual purpose while s. 271 makes it an offence to commit a sexual assault. The elements of a sexual assault are the intentional touching of a sexual nature without the consent of the victim with knowledge, recklessness or wilful blindness to the absence of consent.

[9] Next, the provisions dealing with consent. There are special provisions relating to consent where the victim is under the age of 14. Section 150.1 provides that consent (or non-consent) of a victim who is under 14 years of age is, in general, not relevant to guilt or innocence in relation to the offences of sexual touching or sexual assault. However, under s. 150.1(2), a young complainant's consent is a defence if each of three conditions is present: (i) the victim is 12 years of age or more but under 14; (ii) the accused is less than two years older than the victim; and, (iii) the accused is not in a position of trust or authority towards the victim. The complainant here was over 12 but under 14 and the accused was not in a position of trust or authority towards her. The question, therefore, was whether the accused was less than two years older than the complainant.

[10] The appellant was born on June ..., 1986 (*editorial note- date removed to protect identity*) and the complainant on October ..., 1988 (*editorial note- date removed to protect identity*). The judge found, therefore, that while the complainant was more than 12 but under the age of 14, the appellant was not less than two years older than she was at the time of the offence. In light of these conclusions, the judge found that section 150.1 applied so that the consent or lack of consent of the complainant was irrelevant to the appellant's guilt or innocence of the charges.

3. Reasonable but mistaken belief as to the complainant's age:

[11] Another issue at trial was whether the appellant reasonably, although mistakenly, believed the complainant to be 14 or more years old. Under section

150.1(4) of the **Code**, such belief is only a defence if the accused "... took all reasonable steps to ascertain ..." her age. (It is not disputed on appeal that once there is sufficient evidence of reasonable belief to raise the issue, the Crown must prove beyond a reasonable doubt that the accused failed to make such efforts.) On this issue, the trial judge found that the appellant fell "... far short ... of taking all reasonable steps..." to ascertain the age of the victim and that the evidence persuaded him to the contrary.

[12] In light of his conclusions on mistaken belief and consent, the trial judge convicted the appellant of sexual touching of a person under 14 and of sexual assault.

4. Breaches of undertaking:

[13] The evidence at trial established that the accused had entered into two separate undertakings dated November 21 and 27, 2001 in relation to his release from custody on different sets of charges. Each undertaking required him to keep the peace and be of good behaviour. The convictions for breach of undertaking were based on the appellant breaching that requirement by committing the sexual offences.

[14] It was essential to conviction that the sexual incident which was the alleged breach of the good behaviour condition in the undertakings be proved to have occurred after the undertakings were entered into by the accused. The evidence as to the timing of the incident was vague and the complainant herself testified that it occurred in November in her evidence-in-chief and in December in her cross-examination. The judge found simply that "... the evidence establishes that the incident took place in November or December of 2001", but convicted the accused of both counts of breach of undertaking. He made no explicit finding that the incident occurred after November 27, 2001 (the date of the second undertaking), did not refer to the issue of timing of the incident in relation to the dates of the undertakings and gave no reasons to explain his implicit finding that he accepted the complainant's evidence in cross-examination over her evidence-in-chief with respect to the timing of the incident.

III. Grounds of Appeal:

[15] The issues raised by the appellant, somewhat reordered and restated, are these:

> 1. The verdict is unreasonable, cannot be supported by the evidence and constitutes a miscarriage of justice;
>
> 2. The trial judge erred in law
>
> (a) on the issue of the violation of the Appellant's charter rights under s. 9 and 24 of the Charter and s. 503(1) of the *Criminal Code*;
>
> (b) on the defence of mistake;
>
> (c) on the finding of guilt for the offences under 151 of the *Criminal Code* and 271(1)(a) of the *Criminal Code* as the gravamen of both offences are essentially the same;
>
> (d) on the issue of the elements of the offences under s. 151, 271(1)(a) and 145(3) of the *Criminal Code*;
>
> (e) on the law respecting failure to keep the peace.

[16] In addition to these issues, the Court raised with counsel the question of whether the *Kienapple* principle permitted convictions for two counts of breach of undertaking and whether there was proof that the breach had occurred while the undertakings were in force. I will address the former point as part of my analysis of issue 2(c) and the latter as part of Issue 1.

IV. Analysis:

Issue 1: Unreasonable verdict, verdict not supported by the evidence and miscarriage of justice; Proof of breach of undertaking

[17] This issue may be dealt with briefly. Contrary to the appellant's submissions, these convictions are both reasonable and supported by the evidence. There was no contest of credibility necessitating that the judge direct himself in accordance with **R v. W. (D.)**, [1991] 1 S.C.R. 742 as suggested by the appellant.

There is no basis for appellate intervention disclosed by the first issue raised by the appellant.

[18] I have concluded, however, that the convictions for breach of undertaking must be set aside and a new trial ordered on those charges. It was essential to these convictions that the sexual incident, which was the alleged breach of the conditions in the two undertakings, be proved to have taken place after the undertakings were entered into on November 21 and 27, 2001. The evidence on this point, as noted earlier, was contradictory with the complainant herself giving inconsistent evidence in this regard. The judge found only that the incident occurred in November or December of 2001. With great respect, the judge's failure to advert to and to make a reasoned finding on this critical point in the face of conflicting evidence and in light of his earlier express finding was an error of law: **R. v. Sheppard**, [2002] 1 S.C.R. 869 at para 28.

Issue 2(a): Arbitrary detention and stay of proceedings:

[19] The facts relating to the appellant's arrest and detention were mostly agreed upon at trial. The most relevant of them are the following:

- The appellant was arrested, Chartered and cautioned at 13:15 on March 29, 2002 for sexual assault and violation of an undertaking.
- At 14:23 Constable Morris met with Carolyn Hebert, a Justice of the Peace, at which time he swore to the appellant's Information and the Notice to Parent.
- At 14:29 Constable Morris was in the cell area with Justice of the Peace, Carolyn Hebert, when Ms. Hebert read the charges to the appellant and then remanded him on the request of Constable Morris for a show cause hearing on April 2, 2002.
- The appellant spent the night of March 29, 2002 in the cell area of the Dartmouth Station of the Halifax Regional Police and was transported to the Nova Scotia Youth Centre on March 30, 2002 by a warrant remanding a prisoner into custody dated March 29, 2002 without the benefit of a hearing until 9:30 a.m. on April 2, 2002.
- The appellant was brought before Justice Moira Legere on April 2, 2002 at 2:00 p.m.

[20] The appellant's main submission on appeal is that the justice was required to hold a "meaningful hearing" before remanding the appellant for a show cause hearing.

[21] As the trial judge found, the justice of the peace was acting pursuant to s.516 (1) of the **Code** which permits a justice before or during a show cause hearing to adjourn proceedings for up to three clear days.

> **516.** (1) A justice may, before or at any time during the course of any proceedings under section 515, on application by the prosecutor or the accused, adjourn the proceedings and remand the accused to custody in prison by warrant in Form 19, but no adjournment shall be for more than three clear days except with the consent of the accused.

[22] This section must be read with s. 515(1) which provides that the Crown must be afforded a reasonable opportunity to show cause why the accused should not be released on an undertaking without conditions.

> **515(1)** Subject to this section, where an accused who is charged with an offence other than an offence listed in section 469 is taken before a justice, the justice shall, unless a plea of guilty by the accused is accepted, order, in respect of that offence, that the accused be released on his giving an undertaking without conditions, unless the prosecutor, having been given a reasonable opportunity to do so, shows cause, in respect of that offence, why the detention of the accused in custody is justified or why an order under any other provision of this section should be made and where the justice makes an order under any other provision of this section, the order shall refer only to the particular offence for which the accused was taken before the justice.
> (Emphasis added)

[23] According to s. 515(1), once the prosecutor has requested an opportunity to show cause, the justice is obliged to grant a reasonable opportunity for the prosecutor to do so. The length of that reasonable opportunity is limited by s. 516 which precludes a remand of more than three clear days absent the consent of the accused. It follows that when, as here, an accused is taken before a justice and the prosecutor requests an opportunity to show cause, the only decision for the justice to make is how long, up to three clear days, the remand should be.

[24] The length of the remand is within the discretion of the justice. A three day remand is not automatic. The justice must direct his or her mind to what is a reasonable opportunity to show cause in the circumstances and exercise his or her discretion judicially. There is no provision or requirement for anything approaching a full hearing at this stage. Both long practice and common sense support the view that this is a relatively informal procedure. The requirements of the **Code** are met so long as the justice addresses the request for a remand when the accused appears before him or her and exercises the discretion judicially in light of the relevant circumstances.

[25] There is no evidence here that the justice failed to discharge her duties on the remand. The appellant was taken before the justice promptly after his arrest on Good Friday. The charges were read. The prosecutor requested the opportunity to show cause and the justice remanded the accused to the Tuesday following Easter Monday. Nothing about this is remarkable let alone unlawful.

[26] The appellant relies primarily on three Nova Scotia cases to support his contention that there was a failure to hold a "meaningful hearing" and that this made his detention unlawful and arbitrary. In my view, these cases do not support the appellant's position.

[27] In **R v. Downey** (1996), 157 N.S.R. (2d) 369 (Prov. Ct.), the issue was whether certain conditions in an undertaking were valid. The Court held that before conditions of release can be imposed on an accused, there must be "some kind of hearing, involving a fair opportunity for presentations by the prosecutor and the accused and a decision by an impartial arbiter ..." (at para. 4). This is consistent with the direction in s.515(1) of the **Code** that, unless the prosecutor shows cause (or the accused consents), the justice is to release the accused on an undertaking without conditions. The Court found that the conditions imposed on Downey had simply been presented to him as a *fait accompli* and had not resulted from an impartial determination based on evidence and representations by both sides or from his consent: paras. 10 and 11. The conditions were therefore invalid.

[28] The **Downey** case concerned the imposition of conditions which requires either a show cause hearing or the consent of the accused. The case does not support the appellant's submission that a "meaningful hearing" is required before the justice may remand the accused when the prosecutor requests a reasonable

opportunity to show cause why the accused should not be released on an undertaking without conditions.

[29] **R v. A.H.** (12 February, 2001), Halifax, (N.S.S.C.,F.D.) is a case in which the accused was remanded without any kind of hearing and, apparently, in the absence of any clear request from the prosecutor for an opportunity to show cause. In the absence of such a request (or guilty plea), any order other than release on an undertaking without conditions is contrary to s. 515 of **Code**.

[30] The decision in **A.H.** is not applicable in the present circumstances. Unlike the situation in **A.H.**, the agreed facts of the present case specify that the prosecutor requested a remand for the purpose of holding a show cause hearing. The **A.H.** decision, assuming that it was correctly decided, is of no assistance to the appellant.

[31] In **R. v. J.W.** (21 November, 2001), Halifax (N.S.S.C.,F.D.), the Court found that the justice of the peace had failed to make a determination after impartially weighing and determining the factors as to whether detention was justified on the grounds set out in s. 515 of the **Code**. The Court considered that the justice of the peace had embarked on a s. 515 bail hearing rather than simply remanding the accused in order to permit the prosecutor a reasonable opportunity to show cause. Once again, if this decision is correct, it is not applicable to the facts of the present appeal which concerns a remand for the purpose of permitting the prosecutor a reasonable opportunity to show cause.

[32] In the appellant's case, the Crown conceded at trial that no "meaningful hearing" had taken place before the justice in this case. However, the term "meaningful hearing" was used to contrast what had happened in this case -- an immediate request for a remand to permit the Crown to show cause -- with the entirely different situation involving a full show cause hearing. This is apparent in the Crown's submission to the trial judge that "... what transpired before the Justice of the Peace is exactly the same situation as what would have transpired before a judge <u>when a request is made for a show cause hearing</u>." (Emphasis added) The Crown did not concede that the justice of the peace failed to exercise her discretion judicially in considering the Crown's request for the remand to show cause.

[33] I conclude that the remand in the present case was lawful. The underpinning of the appellant's *Charter* submission was that the remand was unlawful and therefore arbitrary. My conclusion on lawfulness therefore disposes of the argument that there was a breach of the *Charter*. It is unnecessary to address the issue of whether a stay of proceedings would have been an appropriate remedy had there been a *Charter* breach.

[34] It was submitted at trial that the remand from March 29 to April 2 exceeded the three clear days permitted by s. 516(1) of the **Code**. The appellant now concedes, however, that this argument cannot succeed in light of the definition of clear days in the **Interpretation Act**, R.S.C. 1985, c I-21, s. 27.

Issue 2(b): The defence of mistake:

[35] With respect to the mistake issue, the appellant makes two arguments. First, it is submitted, in effect, that the judge did not properly weigh the evidence relevant to mistake; and second, that he failed to require the victim to answer certain questions posed during cross-examination. I would not give effect to either of these submissions.

[36] The judge's reasons show that he had no reasonable doubt as to whether the accused had taken all reasonable steps to ascertain the victim's age. Bearing in mind the deference owed to the factual findings of the trial judge and considering the record, I see no reversible error in this regard. While the judge did not refer to all of the relevant evidence, his reasons, read in conjunction with the trial record, show that he was alive to the relevant issues and decided them according to correct legal principles and in a way which is supported by the evidence.

[37] It is argued that, during the defence cross-examination of the complainant, the judge ought to have directed her to answer certain questions. While the appellant's counsel commented at one point during the cross-examination that the witness was being unco-operative, counsel did not request a direction from the Court and moved on and completed his cross-examination. In my view, there was a full opportunity to cross-examine the complainant and that no direction from the judge was required.

Issue 2(c): The *Kienapple* principle:

[38] The *Kienapple* principle holds that a person cannot be punished twice for the same wrong: **Kienapple v. The Queen** , [1975] 1 S.C.R. 729. The application of this principle gives rise to two questions in this case: first, whether it applies to the offences of sexual touching of a person under 14 and sexual assault arising from the same acts; and second, whether the appellant can be properly convicted of two counts of breach of undertaking arising from the same act of failure to be of good behaviour.

[39] On the first question, the Crown concedes and I agree that convictions should not have been entered for both sexual touching and sexual assault arising out of the same wrongful act. That being the case, the conviction for the more serious offence should be maintained and a conditional stay entered with respect to the other one. The parties apparently do not disagree that the stay in this case should relate to the sexual touching count and I would, therefore, stay it. The stay is conditional on the final disposition of the sexual assault charge and becomes a permanent stay upon the dismissal of all appeals (or the expiry of the relevant appeal periods) in relation to that conviction: See **R. v. Provo**, [1989] 2 S.C.R. 3.

[40] I turn to the second question in relation to the *Kienapple* principle. At the hearing, the Court canvassed with counsel whether the appellant could be properly convicted of two counts of breach of undertaking arising from the same underlying wrongful act. While I have decided, on other grounds, that these convictions must be set aside, in light of the possibility of the same issue arising at a subsequent trial, it will be helpful to address the application of the *Kienapple* principle in relation to these charges.

[41] The Crown does not attempt to support the conviction on two counts of breach of undertaking on the basis that two offences were committed while the appellant was subject to the undertaking. The Crown's position is that the conviction on two counts of breach of undertaking is justified by the existence of two separate undertakings, each of which was breached by the commission of a single sexual offence.

[42] Two undertakings were proved at trial: the first dated November 21, 2001 and the second November 27, 2001. They relate to the appellant's release from custody with respect to two distinct sets of charges arising at two different times

and set out in different Informations. The question to be resolved, therefore, is whether a single conviction for an underlying offence (in this case, sexual assault) can give rise to two convictions for breaches of the condition to keep the peace and be of good behaviour contained in these two separate undertakings.

[43] That brings us back to the *Kienapple* principle. The foundation of the principle is that a person should not be punished twice for the same act, but the cases make it obvious that whether the principle applies is not always a straight forward question.

[44] In **R. v. Prince**, [1986] 2 S.C.R. 480, the Court held that the *Kienapple* principle applies only if two conditions are met. First, there must be a "factual nexus" between the charges. This means that the charges must arise from the same transaction in the sense that the same act of the accused grounds each of the charges. In the present case, this condition is satisfied because the sexual assault by the appellant grounds both of the charges of breaching the condition to keep the peace and be of good behaviour.

[45] The critical condition for this case, therefore, is the second one set out in **Prince**. It requires that there be a "nexus" between the offences. This condition will be satisfied only "...if there is no additional and distinguishing element that goes to guilt contained in the offence for which a conviction is sought to be precluded by the *Kienapple* principle." **Prince** at para. 32. This is consistent with the general rule that "[n]o element which Parliament has seen fit to incorporate into an offence and which has been proven beyond a reasonable doubt ought to be omitted from the offender's accounting to society, unless that element is substantially the same as, or adequately corresponds to, an element in the other offence for which he or she has been convicted.": at para. 31.

[46] To determine whether this second condition is satisfied in this case, one must ask whether there is any "additional and distinguishing element" that goes to guilt between the two counts of breach of undertaking. In my view, there is. While the same act constitutes the failure to be of good behaviour in each charge, an essential element in each is the breach of the particular undertaking. That is, one count relates to and requires proof of the November 21 undertaking and the other relates to and requires proof of the November 27 undertaking. There is,

therefore, an "additional and distinguishing element" that goes to guilt present in each of the two counts.

[47] While I have not been able to find authority which deals with the precise question raised in this case, several decisions in closely analogous situations support my conclusion. For example, it appears to be well settled that the *Kienapple* principle does not bar conviction for both an underlying offence and breach of probation or breach of recognizance where the breach is the same conduct giving rise to the conviction for the underlying offence. In **Prince** at para. 24 the Supreme Court specifically approved the decisions in **R. v. Earle** (1980), 24 Nfld & P.E.I.R. 65 (Nfld. C.A.) dealing with breach of recognizance and possession of a narcotic and **R. v. Pinkerton** (1979), 46 C.C.C.(2d) 284 (B.C.C.A.) dealing with breach of probation and common assault.

[48] In relation to these cases, the Court reasoned that a breach of recognizance or of a probation order was an offence to protect the effective operation of the criminal justice system and was therefore distinct from the purpose of the underlying offence:

> [39] ... The fact that breach of probation is an offence punishable by summary conviction (s. 666(1)) is a clear indication that Parliament cannot have intended a conviction for that offence to operate as a bar to a conviction for the substantive offence (which might attract a far more severe penalty) merely because the substantive offence might be regarded as a particularization of a failure to keep the peace and be of good behaviour. Plainly, breach of probation is an offence designed to protect the effective operation of the criminal justice system, a societal interest which is entirely different from that protected by an offence such as assault. Accordingly, *Kienapple* had no application in those ... cases.

[49] This reasoning was applied to a breach of probation case by this Court in **R. v. D.T.M.** (1993), 126 N.S.R. (2d) 385; N.S.J. No. 479 (Q.L.)(C.A.), and was extended to the offence of breach of undertaking in **R. v. Decker** (1989), 75 Nfld. & P.E.I.R. 314; N.J. No. 96. (Q.L.)(Nfld. C.A.)

[50] In my respectful view, the same principles govern this appeal. The offence of breach of undertaking in s. 145(3) of the **Code** is included in Part IV of the **Code** dealing with offences against the administration of law and justice. As pointed out in **Prince**, an offence of this nature is "... designed to protect the

effective operation of the criminal justice system " (at para. 39). The gravamen of the offence is failure to abide by the undertaking to the Court. Where, as here, there are two undertakings, given on different days to obtain release with respect to different sets of offences charged in different Informations, convictions for breach of both of these entirely separate undertakings do not offend the principle that a person ought not be punished twice for the same wrong. Two promises were made to the court to secure release from custody on two separate sets of charges. Two promises were broken by the same failure to be of good behaviour.

[51] The decision of the majority of the Newfoundland and Labrador Court of Appeal in **R. v. Furlong** (1993), 106 Nfld. & P.E.I.R. 199; N.J. No.168 (Q.L.)(Nfld. C.A.) supports this view. That case raised the issue of whether a single act could found convictions for both breach of a probation order and violation of a bail recognizance. The Court accepted the Crown's argument that the necessary legal nexus was lacking between the two offences because the conduct being punished related to the violation, albeit by the same wrongful act, of two distinct orders: paras. 25 and 26. (**Furlong** was followed by the Quebec Municipal Court in **R. v. Touchette**, [1996] J.Q. No. 5055 (Q.L.).) The same reasoning applies to the facts of this case because the two counts of breach of undertaking relate to the violation of two distinct undertakings.

[52] I conclude that convictions for two counts of breach of undertaking, in the circumstances of this case, would not offend the *Kienapple* principle.

Issue 2 (d) and (e): *Mens rea* for breach of undertaking:

[53] The question here is whether the accused possessed the necessary guilty mind (*mens rea*) for the offence of breach of undertaking under s. 145(3) of the **Code** . Although I would set aside the breach of undertaking convictions on other grounds, it will be useful to address this issue which may arise in a subsequent trial of these charges.

[54] The appellant argues, based on **R. v. Docherty**, [1989] 2 S.C.R. 941, that the accused must have intended to breach the provisions of his undertaking. It is submitted that the appellant merely engaged in consensual sexual activity which he did not know would breach his undertaking.

[55] I cannot accept this submission. The reliance on **Docherty** is misplaced. That case concerned the offence of wilful failure or refusal to comply with the terms of a probation order. That offence is not fairly comparable to the offences with which the appellant was charged, namely, failing, without lawful excuse, the proof of which lies on him, to comply with the conditions of an undertaking.

V. Disposition:

[56] I would set aside the conviction for sexual touching and enter a conditional stay with respect to it as set out in para. 39 of my reasons. I would also set aside the convictions for breach of undertaking and order a new trial of those charges. In other respects, I would dismiss the appeal.

Cromwell, J.A.

Concurred in:

Roscoe, J.A.

Saunders, J.A.